

Percoco v 140 W. 57th St. Bldg. LLC

2017 NY Slip Op 30105(U)

January 18, 2017

Supreme Court, New York County

Docket Number: 152386/14

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

MATTHEW A. PERCOCO,

Index No.: 152386/14
DECISION/ORDER

Plaintiff,

-against-

140 W. 57th STREET BUILDING LLC and NURMINEN
CONSTRUCTION OF N.Y., INC. and CRIMSON
& WHITE, LLC,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for partial summary judgment and defendant 140 W. 57th Street Building LLC's motion for summary judgment on its cross-claim.

Papers	Numbered
Plaintiff's Notice of Motion (sequence 1)	1
Defendant 140 W. 57th Street Building LLC's Affirmation in Opposition	2
Defendant 140 W. 57th Street Building LLC's Memorandum of Law	3
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Defendant 140 W. 57th Street Building LLC's Supplemental Affirmation in Opposition	5
Defendant 140 W. 57th Street Building LLC's Notice of Motion (sequence 2)	6
Defendant Crimson & White, LLC's Affirmation in Opposition.....	7
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140 W. 57th Street Building LLC.

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Law Offices of Safranek, Cohen & Krolian, White Plains (Karen Maniscalco of counsel) for defendant Nurminen Construction of N.Y., Inc.

Gerald Lebovits, J.

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is an action to recover damages for personal injuries that plaintiff Matthew A. Percoco — a plumber's helper — allegedly sustained on September 7, 2012, while performing pipe installation work at a construction site located at 140 West 57th Street in New York County (the premises). Plaintiff allegedly fell from a makeshift scaffold that collapsed.

In motion sequence number 001, plaintiff moves under CPLR 3212 for partial summary judgment in his favor on liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendant 140 W. 57th Street Building LLC (defendant W. 57th).

In motion sequence number 002, defendant W. 57th moves under CPLR 3212 for summary judgment on its cross-claim seeking contractual defense and indemnification against defendant Crimson & White, LLC (Crimson).

BACKGROUND

On the day of the accident, defendant W. 57th owned the premises where the accident occurred. Before the accident, defendant W. 57th leased the premises to Crimson. Crimson then subleased the premises to nonparty Crimson & White Markets, Inc. (Crimson Markets). Crimson and/or Crimson Markets contracted with defendant Nurminen Construction of N.Y., Inc. (Nurminen), to perform alterations to the premises for a grocery store (the project), which included the pipe installation work that plaintiff performed at the time of the accident. Plaintiff was employed by nonparty MB Mechanical (MB), a plumbing subcontractor, as a plumber's helper.

Plaintiff's Examination Before Trial (EBT) Testimony and Affidavit

Plaintiff testified that on the day of the accident, he was working at the premises as a plumber's helper for MB, a subcontractor hired to install plumbing on the building's three floors. Plaintiff's duties included installing a line of four-inch drain piping in the basement's ceiling. Plaintiff testified that Michael Burke, who owned MB, was his direct supervisor. Burke's son, Louie Burke, gave plaintiff his daily work instructions. Plaintiff testified that any scaffolding or ladders that he used at the job site were owned by MB. Plaintiff noted that, in the three-to-four months he worked at the premises, he never attended a safety meeting, nor was he ever given any safety literature. He also never observed a safety meeting underway at the premises.

Plaintiff explained that to reach the basement's ceiling to perform his work, he had to use a makeshift scaffold that consisted of a wooden frame affixed to the wall. The makeshift scaffold was comprised of three levels of two- by four-foot pieces of wooden board: one on the bottom, one in the middle, and one on the top. Plaintiff testified that the uppermost piece of board was unsecured — it was not fastened to the wall in any way. Plaintiff testified that he did not know who installed the makeshift scaffold or how long it had been installed before the accident. Also, no one told him to use it or not to use it to perform his work. Plaintiff testified that he was not given any other safety devices to protect him from falling.

Plaintiff explained that his work required him to climb and work from the middle board of the makeshift scaffold — approximately three to four feet off the ground. His work included clamping a bracket or hanger onto an I-beam located approximately 10 to 12 feet off the ground. The accident occurred as he was holding on the upper board to climb down off the scaffold. Suddenly and without warning, the upper board gave way from the framework and collapsed, causing plaintiff to fall backward and into a nearby unprotected escalator pit.

Plaintiff testified as follows: “I went to climb down, and that’s when I felt the 2-by-4 kind of like give way, and I fell backwards with the 2-by-4” (plaintiff’s tr at 66). He also explained that as he “was holding on to the top [board], and [he] kind of turned a little bit to get down . . . it’s when I fell backwards. Because, that 2-by-4 just pulled away” (*id.* at 68). Plaintiff maintained that he suffered injuries to his neck when his “neck kind of slid down into the pit with [him]” (*id.* at 84).

Plaintiff testified that he never observed any barricades around the escalator pit, nor was he ever told not to work in the accident area. Although there may have been a 10-foot-tall A-frame ladder and a scaffold on the premises, he was unable to use them in his workspace because “[t]here was no space” to set them up because of the close proximity of the escalator pit to the wall (*id.* at 101). The distance between the subject wall and the escalator pit was only about “a foot” (*id.*).

At his EBT and in his affidavit, plaintiff asserted that the photographs of the accident location and the makeshift scaffold shown to him (exhibits A and B) are fair and accurate representations. Also, he states in his affidavit that “[a]lthough there was a scaffold on the job site, and an A-frame ladder that was approximately 10’ tall, neither of these devices could fit into the narrow space between the wall and the elevator pit. There were no climbing devices available” (defendants’ notice of motion, exhibit H, plaintiff’s affidavit). Further, he “was not provided with any ladders, scaffolds or other safety devices at the location where he was working that could fit into the space next to the uncovered escalator pit, to provide [him] with proper protection” (*id.*). Plaintiff described the escalator pit; it measured three feet wide and one and one-half feet deep.

Barry Zimmerman’s Affidavit (Property Manager at the Premises)

In his affidavit, Barry Zimmerman stated that he served as the property manager for Jeffrey Management Corp., the managing agent for the premises. On the day of the accident, under a lease with defendant W. 57th, Crimson was the tenant of the main floor and basement of the premises. Crimson subleased the premises to Crimson Markets to construct a grocery store. Crimson and/or Crimson Markets hired Nurminen to alter the space, including MB’s work.

Zimmerman maintained that defendant W. 57th never contacted MB; it was not involved in the project. Defendant W. 57th never supervised or directed MB’s work on the project.

Nurminen’s Injury Report

Nurminen’s injury report provides that plaintiff was injured while installing a pipe bracket. The report also provides that the accident area

“was available fully planked on August 28 & 29, planks [were] removed on the 29 end of workday. The escalator was delivered on August 30 & placed into the bottom pit. No one was on site from MB Plumbing those two days see attached daily reports. It was brought up at yesterday’s meeting on 9/6/12 when Schindler wasn’t working on the escalator and the proper working platform installed over

the escalator for trades to complete this work. I told Mike Burke on Wednesday that that area was off limits and only Schindler [was] to work there only and Sunday other trades could work above the escalator. He said my men are tired and weren't working on Sunday" (defendants' opposition to plaintiff's motion, exhibit C, Nurminen Injury Report).

Nurminen's Meeting Minutes

Nurminen's meeting minutes provides an ongoing list of "Standard Project Requirements." An update included in those minutes, dated April 19, 2012, provides that "[s]tarting 4/23/12, [t]he following will be [e]nforced . . . hard hats and safety glasses . . . [safety] harnesses and [safety] lanyards will be required in fall risk areas" (defendant's opposition to plaintiff's motion, exhibit G, Nurminen's meeting minutes).

DISCUSSION

On a summary-judgment motion, the movant "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; accord *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). A court that has any doubt that a triable issue of fact exists must deny summary judgment (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim (motion sequence number 001)

Plaintiff moves for partial summary judgment in his favor on liability on the Labor Law § 240 (1) claim against defendant W. 57th.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides that

"[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Section 240 (1) "'was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*,

281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Section 240 (1) provides extraordinary protections, but

“[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *accord Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff’s injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Plaintiff argues that defendant W. 57th violated Labor Law § 240 (1). Plaintiff was subjected to an elevation-related risk. The unsecured makeshift scaffold that plaintiff used as a safety device to protect him from falling collapsed as he performed his work on the ceiling. Whether a device provides “proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials” (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *accord Agresti v Silverstein Props.*, 104 AD3d 409, 409 [1st Dept 2013] [finding that Labor Law § 240 [1] liability where the makeshift scaffold failed to protect the plaintiff from falling]; *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 1102 [2d Dept 2012] [finding Labor Law § 240 [1] liability where “(t)he collapse of the makeshift scaffold . . . failed to afford the injured plaintiff proper protection for the work being performed, and . . . this failure was a proximate cause of his injuries”]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801 [2d Dept 2010] [finding that “[s]ince the scaffold collapsed, the plaintiff established, prima facie, that he was not provided with an adequate safety device to do his work, as required by Labor Law § 240 (1)”]).

Also, the makeshift scaffold proved unstable and, thus, inadequate to protect plaintiff from falling; additional safety devices, such as a harness, lanyard, and place to tie off were necessary to prevent him from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [holding that plaintiff was working on an elevated work platform that “was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface,” the Court considered that “[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over”]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762-763 [2d Dept 2006] [holding it foreseeable that pieces of metal dropping to the floor could strike the scaffold and cause it to shake, thus additional safety devices were required to satisfy Labor Law § 240 [1]]).

Having a particular safety device available “will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without

the use of additional precautionary devices or measures” (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

That plaintiff may have only fallen a few feet is of no consequence: Plaintiff was injured because defendant W. 57th failed to provide plaintiff with protective device intended to protect plaintiff from falling (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003] [noting that while the scaffold was only four feet above the ground, no basis existed for ignoring § 240 [1] requirements when liability is based on a protective device's defect, a device specifically listed in the statute]; *Gettys v Port Auth. of N.Y. & N.J.*, 248 AD2d 226, 227 [1st Dept 1998] [noting that when the exact height of the makeshift platform that plaintiff fell from is in dispute, “even a platform elevated only 2 feet from the ground would be subject to the protection of the statute”]).

In opposition to plaintiff's motion, defendant W. 57th argues that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because a question of fact exists about whether plaintiff was the sole proximate cause of his accident — his recalcitrance in using the makeshift scaffold when ladders and scaffolds were readily available at the job site. An employer has “the duty to see that safety devices are furnished and employed” (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). If a defendant “presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist” (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [holding that if plaintiff's own actions are the sole proximate cause of the accident, no liability exists under Labor Law § 240(1)]).

But plaintiff testified that he could not safely use those safety devices: The distance between the wall and the elevator pit was about one foot. Photographs show that there was insufficient space in plaintiff's work area to fit a ladder or scaffold.

Defendant has not demonstrated that this is a case of a recalcitrant worker; plaintiff was not specifically instructed to use a safety device but refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]). Also, “no evidence in the record [shows] that [plaintiff] knew where to find the safety devices . . . or that he was expected to use them” (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Although defendant W. 57th uses Nurminen's meeting minutes to establish that harnesses and lanyards were required on the project, evidence of generalized “standing order[s]” are not sufficient to demonstrate that plaintiff was specifically instructed to use these safety devices and that he unreasonably chose not to (*id.*). Nurminen's injury report, which provides that Burke was told that the accident area was off limits on the day of the accident, is insufficient to establish that plaintiff was ever made aware of this fact.

In any event, whether plaintiff contributed to the accident by using the makeshift scaffold or for working in an area where he should not have been working goes to the issue of comparative

fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action. The statute imposes absolute liability once plaintiff shows a violation (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). The Labor Law “does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that ‘if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it’” (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290).

Where “the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]” (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; accord *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [finding that defendants failed to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall; “no reasonable view of the evidence to support defendants’ contention that plaintiff was the sole proximate cause of his injur(ies)”]).

Contrary to defendant W. 57th’s contention in opposition to plaintiff’s motion, plaintiff’s “motion was not premature, as [defendant] failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of [plaintiff] [internal citation omitted]” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; *Adams v Glass Fab*, 212 AD2d 972, 974 [4th Dept 1995]). Plaintiff argues that the facts surrounding plaintiff’s accident and defendants’ liability are clearly laid out through plaintiff’s EBT, affidavit, photographs of the makeshift scaffold, the accident area, Nurminen’s written injury report, and Zimmerman’s affidavit.

In opposition, defendants have “not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiffs’ showing or to raise a bona fide issue as to how the accident occurred” (*Pineda v Kecheek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; accord *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]). A “[m]ere hope that somehow the [defendant] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212 (f) for postponing a determination of a summary judgment motion” (*Plotkin v Franklin*, 179 AD2d 746, 746 [2d Dept 1992]; accord *Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

Plaintiff is entitled to partial summary judgment in his favor on liability on the Labor Law § 240 (1) claim against defendant W. 57th. Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

The Labor Law § 241 (6) Claim (motion sequence number 001)

Plaintiff also moves for partial summary judgment in his favor on liability on the Labor Law § 241 (6) claim against defendant W. 57th Labor Law § 241 (6) provides as follows:

“All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6) imposes a nondelegable duty on “owners and contractors to ‘provide reasonable and adequate protection and safety’ for workers” (*see Ross*, 81 NY2d at 501-502). But Labor Law § 241 (6) is not self-executing. To show a violation of this statute and withstand a defendant’s motion for summary judgment, a movant must show that the defendant violated a specific, applicable, implementing Industrial Code regulation, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple alleged Industrial Code violations in the bill of particulars, plaintiff moves only for summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (1) (i).

Industrial Code § 23-1.7 (b) (1) (i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to support plaintiff’s Labor Law § 241 (6) claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; accord *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) provides the following:

“(b) Falling hazards
(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).”

The term “‘hazardous opening’ is not defined in 12 NYCRR 23-1.7 (b). Based on a review of the regulation as a whole — particularly the safety measures delineated therein — it is apparent

that the regulation is ‘inapplicable where the hole is too small for a worker to fall through’” (*Rice v Bd. of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003], quoting *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422-423 [2d Dept 2001] [holding that “hazardous openings” regulation did not apply where the 12-inch by 16-inch hole that worker fell into was too small for him to fall through]; accord *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [finding that a 10-to 12-inch gap was not a hazardous opening]).

Here, although the escalator pit was not guarded by either a substantial covering or a safety railing, section 1.7 (b) (1) (i) does not apply to this case: The pit was too shallow for plaintiff to fall through it.

Thus, plaintiff is not entitled to partial summary judgement in his favor on liability on that part of the Labor Law § 241 (6) claim predicated on defendant W. 57th’s alleged violation of section 23-1.7 (b) (1) (i).

Defendant’s Cross-Claim Against Crimson for Contractual Defense and Indemnification (motion sequence number 002)

Defendant W. 57th moves for summary judgment in is favor on its cross-claim seeking contractual defense and indemnification against Crimson.

Additional Facts Relevant To This Issue: The Lease

On November 11, 2011, defendant W. 57th and Crimson entered into a lease that included the basement of the premises where the accident occurred. At the time of the incident, the lease was in full force and effect. The lease provides that

“[Crimson] shall not do or permit any act or thing to be done in or to the demised premises which is contrary to law, or which will invalidate or be in conflict with public liability, fire or other policies of insurance at any time carried by or for the benefit of Owner, or which shall or might subject Owner to any liability or responsibility to any person, or for property damage. Tenant shall pay all costs, expenses, fines, penalties or damages, which may be imposed upon Owner by reason of tenant’s failure to comply with the provisions of this article” (defendant’s notice of motion, exhibit I, Zimmerman aff, exhibit A, ¶ 6).

An indemnification provision contained in the lease provides as follows:

“Tenant [Crimson] agrees to indemnify and hold [defendant] harmless from and against any and all liability, obligations, damages, penalties, claims, costs, charges, fees (including attorneys’ fees and expenses) resulting from any orders and/or judgments obtained due to a breach by Tenant of any of its obligations under this Lease. Furthermore, Tenant agrees to pay expenses of Owner in any action or proceeding brought to enforce this indemnification agreement” (*id.*, ¶ 47).

The Lease also contains a rider:

“In the event of any inconsistencies between the provisions of the printed lease and those contained in this Rider, the provisions of the Rider shall govern and be binding” (*id.*, the rider).

Paragraph 49 of the rider, entitled “Public Liability Insurance,” provides that Crimson maintain “at its own cost and expense” commercial general liability insurance and worker’s compensation insurance. Also, under paragraph 49 iii C of the rider, Crimson was to maintain “ALL RISK PROPERTY INSURANCE with replacement cost valuation for all Tenant-installed improvements and betterments, and Tenant’s personal property.” Paragraph 49 iii C provides as follows:

“C. Each party hereby releases each other and their officers, directors, agents, partners, servants, employees, landlords, mortgages, and affiliates from any liability and waives on behalf of its insurer and of any occupant claiming its right of occupancy by or through the releasing person may claim for a loss or damage, including any claim for loss of rents or profits, which loss or damage is of the type to be covered by the insurance required to [be] maintained by the parties regardless of any negligence on the part of the released persons which may have contributed to or caused such loss or damage” (*id.*, ¶ 49 iii C).

The Sublease

Along with the lease, Crimson entered into a sublease with Crimson Markets (the sublease) with respect to the premises, which was in full force and effect. On the date of the accident, Crimson was the premises’ tenant and Crimson Market was the subtenant. The sublease contains an indemnification provision, which provides, in pertinent part, as follows:

“46. Indemnification. [Crimson] and [Crimson Markets] agree to save each other and [defendant], harmless from, and indemnify each other against, any and all injury, loss or damage, of whatever nature, to any person or property in the Premises or outside the Premises if caused by or resulting from any act, omission or negligence of such party or any employee or agent of such party or any contractor or subcontractor of such party” (defendant’s notice of motion, exhibit I, Zimmerman aff, exhibit C, ¶ 46).

Here, defendant W. 57th asserts that Crimson has breached the lease and sublease by engaging or permitting activity at the premises that has subjected it to liability from plaintiff. Plaintiff’s alleged injury occurred at the premises during the terms of the lease and the sublease, and his injury resulted from construction work performed for Crimson and/or Crimson Markets. Defendant W. 57th asserts that the indemnity language contained in both the lease and the sublease evidences a clear and unambiguous intent for Crimson to defend and indemnify defendant W. 57th for plaintiff’s injury.

In opposition to defendant W. 57th's motion, Crimson asserts that paragraph 49 iii C of the rider constitutes a mutual waiver of liability that is clearly inconsistent with the defense and indemnification obligations contained in the lease. Therefore, the language of the waiver governs.

Contrary to Crimson's argument, the waiver pertains to insurance liability resulting from property damage to the premises as a result of Crimson's acts, and not liability resulting from personal injury. Therefore, no inconsistency exists between the lease's language and the rider's language on whether Crimson owes defendant W. 57th defense and indemnification for plaintiff's personal injury claims. In any event, irrespective of the lease, under the sublease, because the accident arose from Crimson's work at the premises, defendant W. 57th is entitled to contractual indemnification from Crimson.

Thus, defendant W. 57th is entitled to summary judgment in its favor on its cross-claim for contractual defense and indemnification against Crimson.

The court has considered Crimson's remaining arguments on this issue and finds them without merit.

Accordingly, it is hereby

ORDERED that plaintiff Matthew A. Percoco's motion (motion sequence number 001), under CPLR 3212 for partial summary judgment in his favor on liability on the Labor Law § 240 (1) claim against defendant 140 W. 57th Street Building LLC is granted, and the motion is otherwise denied; and it is further

ORDERED that defendant 140 W. 57th Street Building LLC's motion (motion sequence number 002) under CPLR 3212 for summary judgment in its favor on its cross-claim seeking contractual defense and indemnification against defendant Crimson & White, LLC is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 18, 2017



HON. GERALD LEBOVITS
J.S.C.